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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1072

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union, *Petitioners,*

v.

WILSON P. LOCKRIDGE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus* in support of the position of the Petitioners is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred twenty national and international labor organizations having a total membership of approximately thirteen million five hundred thousand working men and women. The issue in the instant case concerning the authority of a state court to hear a suit as to the validity of a discharge pursuant to a union security agreement, a matter within the central concern of §§ 8(a)(3) and 8(b)(2) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, is of course of substantial practical moment to the labor movement. Nevertheless, it is not, all other things being equal, one which would have motivated the Federation to take the liberty of imposing on this Court. For as the Petitioners demonstrate, with great clarity and force, the decision below is plainly contrary to this Court's decision in *Local 100 Plumbers* v. *Borden*, 373 U.S. 690 (1964).

Under the surface of the instant case, however, there is an issue of wider legal ramifications. There are a number of limitations and exceptions to the exclusive primary jurisdiction of the NLRB as declared in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), in addition to the exception providing for state regulation of internal union affairs established by *Machinists* v. *Gonzales*, 356 U.S. 617 (1958). Each of these exceptions and limitations creates a potential for state interference with activity declared lawful by the Act. In general, as we show in detail at pp. 10-16, *infra*, this Court has evolved decisional rules which have minimized this potential by focusing "on the nature of the activities which the state has sought to regulate rather than on the method of regulation" *Garmon*, 359 U.S. at 243. The major exception has been *Gonzales*, which even as interpreted in *Borden*, directs attention to the legal labels utilized by the state rather than the

nature of the conduct in question. As the instant case demonstrates, the *Gonzales* method of distinguishing between the area preempted by the Board and the area open to the states has an inherent potential for instability. We therefore take this occasion to urge that the line between internal union affairs and union activity regulated by the Act be restated in terms of the analysis suggested by *Garmon*. This would result in preserving the states' full right to regulate union activity against membership rights, which is of "merely peripheral concern" under the Act, *Garmon*, 359 U.S. at 243, but would bar the states from regulating union activity against job rights, whether such regulation is straightforward or under the rubric of "filling out" the state remedy, *Gonzales*, 356 U.S. at 619, since union activity against an individual's job rights is at the heart of the federal scheme of regulation, see, *Radio Officers Union* v. *NLRB*, 347 U.S. 17, 40-42 (1954).

ARGUMENT

STATE COURT JURISDICTION TO DECIDE THE LEGALITY OF A DISCHARGE PURSUANT TO A UNION SECURITY CLAUSE IS PREEMPTED BY THE EXCLUSIVE PRIMARY JURISDICTION OF THE NLRB

In the instant case the Union secured the discharge of Wilson P. Lockridge as a Greyhound bus driver on the ground that he had forfeited his good standing membership in the Union by late payment of dues and was therefore subject to termination under the union security clause in the applicable collective agreement (A. 90-92). Lockridge did not file a charge with the National Labor Relations Board; instead he sued in the Idaho state courts. The basic allegation in his complaint was that the Union had deprived him "of his livelihood and all benefits of his employment with Greyhound Corporation that accrued to

him and would accrue to him by reason of his employment, seniority and experience . . ."; and the sole relief sought was monetary damages measured by his lost employment earnings and benefits (A. 46-48). The question presented is whether the Idaho courts acted properly by exercising jurisdiction over Lockridge's claim, thereby rejecting the Union's argument that this suit is within the exclusive primary jurisdiction of the NLRB.

1. "In [1947] Congress undertook pervasive regulation of union security agreements" in §§ 8(a)(3) and 8(b)(2) of the National Labor Relations Act, 61 Stat. 140, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, *Local 1625 Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 100 (1963). The rule, relevant to the instant case, established by these provisions, is that a discharge pursuant to a union security arrangement is proper if it is based on a failure to "tender periodic dues . . . uniformly required as a condition of retaining [union] membership" and that:

> "Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues or fees. . . . Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union in condoned" *Radio Officers Union* v. *NLRB*, 347 U.S. 17, 42 (1954)

See also, *e.g.*, *Frigidaire Local 801 IUE* v. *NLRB*, 307 F.2d 679, 684 (C.A. D.C. Cir., 1962) *certiorari denied*, 371 U.S. 961; *Local 545 IUOE*, 161 NLRB 1114, 1119 (1966); *NLRB* v. *Local 182 Teamsters*, 401 F.2d 509 (C.A. 2nd Cir., 1968), *certiorari denied*, 394 U.S. 904. As a matter of necessity, the implementation of this rule turns on both the language of the applicable union security clause and of the union rules and practices as to the financial require-

ments of retaining membership. And the Board, in carrying out its responsibility therefore interprets internal union rules as a matter of course, *e.g. Local 703 Laborers,* 181 NLRB No. 140, 73 LRRM 1553 (1970); *NLRB* v. *Local 333 NMU,* 417 F.2d 865 (C.A. 2nd Cir., 1969).

In sum, the Act regulates all discharges based on union security agreements; it authorizes those based solely on a failure to tender periodic dues, and forbids all others. Any employee with any complaint whatsoever concerning an illegal discharge pursuant to a union security clause has clear access to the Board's processes. On the other hand, in light of the proviso to § 8(a) (3) it is beyond the authority of any tribunal to hold a union or an employer liable for a discharge pursuant to a valid union security clause based solely on a failure to maintain good standing membership. Thus in this area there is no middle ground. The Act plainly occupies the entire field.

The establishment of the exact perimeters of the preemptive effects of the NLRA has occasioned much travail. The process of "litigating elucidation" *Machinists* v. *Gonzales,* 356 U.S. 617, 619 (1958), caused by the "Delphic nature. . . [of] the statutory implications concerning what has been taken from the States and what has been left to them," *ibid.,* has not pretermitted controversy, see, *e.g., Local 1416 ILA* v. *Ariadne Shipping Co.,* 397 U.S. 195 (1970). As is frequently true, the existence of a measure of disagreement at the periphery has tended to obscure the fact that the basic decisions of this Court have articulated at least one central principle of the broadest acceptance—that the states cannot lay hold of any class of conduct the Board is empowered to regulate where there is a possibility that the state might condemn that which the Board could exonerate. At this late date there is, we believe, no need for a lengthy demonstration of the validity of the foregoing proposition by tracing the evolution of

the theory of the Board's exclusive primary jurisdiction from *Garner* v. *Local 776 Teamsters*, 346 U.S. 485 (1953) through *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (1957) to *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). It is sufficient that there was unanimity both in *Garner* and *Garmon* that the preclusion of the possibility of conflict between federal and state law is central to preemption. Thus, without dissent the *Garner* opinion emphasized (346 U.S. at 489-490):

> "It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, [and] to issue its own complaint against respondents . . ."
>
> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

The definitive statement of the exclusive primary jurisdiction doctrine is, of course, that by Mr. Justice Frankfurter for five members of the Court in *Garmon*; and that

majority opinion likewise stressed the theme of possible conflict (359 U.S. at 244):

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control which is the subject of national regulation would create potential frustration of national purposes."

While not all of Mr. Justice Frankfurters' reasoning commend itself to the entire Court there was no dissent from the proposition that the state court lacked jurisdiction in the circumstances there presented. For Mr. Justice Harlan concurring, stated (359 U.S. at 249-250):

> "I concur in the result upon the narrow ground that the Unions' activities for which the State has awarded damages may fairly be considered protected under the Taft-Hartley Act, and that therefore state action is precluded until the National Labor Relations Board has made a contrary determination respecting such activities. . . . The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all state power."

It is beyond dispute that the Idaho courts assertion of jurisdiction in the instant case and the finding that the Union's actions were unlawful create a potential conflict with the Board's regime. There was no impediment to the filing of a Labor Board charge by Lockridge.[1] The Act does not merely regulate union security agreements; it gives unions the right to insist on discharges for the failure to maintain good standing union membership and it interdicts discharges pursuant to such clauses on any other ground. And Lockridge's claim is precisely that the Union had transgressed this limitation and wrongfully procured his discharge. The Union has continuously maintained that its action was entirely proper as a matter of federal law. Under the principles universally agreed upon in *Garmon* the exclusive primary jurisdiction to resolve that controversy rests in the Board pursuant to the procedures set out in § 10 of the Act.

At the time the Union sought Lockridge's discharge, it also sought the discharge of Greyhound driver Elmer J. Day for failure to maintain his good standing membership. Day utilized the Board's procedures. He filed a charge. After a complete investigation, and despite the fact that the law is that a union secured discharge for dues delinquency is presumptively a violation and the union must show that the discharge was in fact predicated on a proper interpretation of a valid union security clause, *e.g., Local 545 IUOE,* 161 NLRB at 1119, the Board's Re-

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[1] If Lockridge had filed a charge and the Board had found for him it could, of course, have awarded him reinstatement with lost seniority, and back pay with interest. It would also appear that it is within the Board's power to order reinstatement to union membership, see, *NLRB* v *Marine & Shipbuilding Union,* 391 U.S. 418 (1968). Thus, while *Gonzales'* assumption that the Board cannot "restore union rights", 356 U.S. at 620, is in our view the better reading of the Act, it has not proved a correct prophecy as to the direction the law has taken.

gional Director dismissed Day's charge because "there was insufficient evidence of violation" (A. 14). As the Oregon courts recognized, *Day* v. *Northwest Division 1055, Motor Coach Employees,* 238 Ore. 624, 389 P.2d 42 (1964), *certiorari denied,* 379 U.S. 878, the least the Board's handling of Day's case shows is that the states do not have the power to act since the character of the Union's "activity [has not been defined] with unclouded legal signficance" *Garmon,* 359 U.S. at 246. Indeed, in light of the nature of the law which governs the unfair labor practice charged by Day, pp. 4-5, 8, *supra,* and this Court's opinion in *Hanna Mining Co.* v. *District 2 MEBA,* 382 U.S. 181 (1965), holding that a ruling by the Board's General Counsel can be treated as equivalent to a Board decision when its legal significance is clear, it may fairly be said that the proper conclusion is that the disposition of Day's case shows that the Union's actions were proper. For if the discharge was not an unfair labor practice it was authorized as a matter of federal law. Whether this aspect of *Hanna Mining* is pertinent here or not it is plain that refusals to issue complaints are part and and parcel of the overall scheme enacted by Congress and as *Garmon* properly recognizes such a refusal does not open the doors to the state courts.

The course followed by the Idaho courts here threatens the entire structure that Congress has erected to deal with alleged unfair labor practices. Day's charge was dismissed before Lockridge acted. Thus a rational man in Lockridge's position would know that his chances of success before the Board were limited. His inclination, and indeed the inclination of anyone who has reason to believe that his claim cuts into activity sanctioned by the Act is to shop for a more hospitable forum. To the extent that the state courts facilitate implementation of that inclination, they undermine:

> "the unifying consideration of [this Court's] decisions which has been regard to the fact that Congress

has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Garmon*, 359 U.S. at 242.

2. The Idaho courts (A. 90) rested their jurisdiction on this Court's decision in *Gonzales*, 356 U.S. at 618, holding that the states may hear suits in which the "crux of the claim" is an allegedly wrongful deprivation of union membership. As the Union demonstrates the complete answer to this view is that here, as in *Local 100 Plumbers* v. *Borden*, 373 U.S. 690, 697 (1964), the state lacked jurisdiction because the "crux of the action (*Gonzales*, 356 U.S. at 618) concerned [Lockridge's] employment relations." We fully agree that *Borden* requires reversal. While there is thus no need to go beyond present law to reach the correct result here, the instant case demonstrates that *Gonzales*, even as limited by *Borden*, provides a wide avenue for state courts to enter the area preempted by the Act. We therefore suggest a reformulation of the governing rule in terms which will more effectively safeguard what all the Justices in *Garmon* agreed to be the major purpose of the Board's exclusive primary jurisdiction—the prevention of potential conflicts with federal substantive policy.

There are a number of limitations and exceptions to the proposition that the states must defer to the Board in the first instance.[2] Thus this Court's decisions indicate that in addition to internal union affairs, the states are free as to violence, *International Union UAW* v. *Russell*,

[2] Lockridge has not argued that there is a federal basis for the Idaho court's jurisdiction here. Thus we do not deal with the distinct questions which arise from the application of *Garmon* to suits predicated on an independent federal jurisdictional base: §301, §303, the Antitrust laws or the duty of fair representation; see, *Smith* v. *Evening News*, 371 U.S. 195 (1962); *Meatcutters* v. *Jewel Tea*, 381 U.S. 676, 684-688 (1965); *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

356 U.S. 634 (1958); union organizational activity directed at foreign flag seamen, *Incres S.S. Co.* v. *Maritime Workers*, 372 U.S. 24 (1963); the enforcement of right to work laws, *Schermerhorn*, 375 U.S. at 102; the use of economic pressure in connection with representation disputes involving supervisors, *Hanna Mining*, 382 U.S. at 186-190, and "libel issued with knowledge of its falsity, or reckless disregard of whether it was true or false," *Linn* v. *Plant Guards*, 383 U.S. 53, 61 (1966).

In every one of the above noted instances there is an interface between the class of conduct open to state regulation and activity protected by the Act. And in every instance, except that relating to state regulation of internal union affairs, this Court has been astute to erect and maintain clear lines delimiting the area open to the states precisely to preclude the possibility of conflict—as we shall now demonstrate.

In *Youngdahl* v. *Rainfair*, 355 U.S. 131 (1957), the Arkansas courts enjoined threats and intimidation by strikers directed at strikebreakers and all picketing and patrolling of the struck plant as well. The Court upheld the first portion of the injunction but struck down the latter prohibition (355 U.S. at 139):

> "Though the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, yet it is equally clear that such court entered the preempted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners. The picketing proper as contrasted with the activities around the headquarters, was peaceful. There was little, if any, conduct designed to exclude those who desired to return to work. Nor can we say that a pattern of violence was established which would inevitably reappear in the event picketing were later resumed."

Thus the state court was not allowed to utilize its juris-

diction to enjoin violence as a basis for entering the pre-empted area; it was required to sever with surgical precision the conduct open to its regulation from the conduct subject to exclusive Board regulation. As this Court noted in reaffirming the principle enunciated in *Youngdahl*:

> "This Court has consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes, sustaining a variety of remedial measures against the contention that state law was pre-empted by the passage of federal labor legislation . . .
>
> "Petitioner concedes the principle, but argues that the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity. We agree.
>
> "Our opinions on this subject, frequently announced over weighty arguments in dissent that state remedies were being given too broad scope, have approved only remedies carefully limited to the protection of the compelling state interest in the maintenance of domestic peace." *Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-730 (1966).

Perhaps the most striking example of the Court's concern to prevent the states from interfering with overriding national law is the holding in *Schermerhorn* that the states may not, in enforcing their "right-to-work" laws, regulate peaceful picketing alleged to have an object of securing a union security agreement (375 U.S. at 105):

> "As a result of §14(b), there will arise a wide variety of situations presenting problems of the accommodation of state and federal jurisdiction in the union-security field . . . picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union-security statute lies exclusively in the federal domain (Local Union 429

> v. Farnsworth & Chambers Co., 353 U.S. 969, and Local No. 438 v. Curry, 371 U.S. 542), because state power recognized by §14(b), begins *only with actual negotiation and execution of the type of agreement described by §14(b)*. Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under Garmon." (emphasis in original)

The result of *Schermerhorn* is that the states are not allowed to stray beyond the exact confines set by §14(b) even when they claim that a wider jurisdiction is necessary to prevent conduct directed toward a goal illegal under a law the state is expressly authorized to enforce.

In terms of the point being pursued here the decision in *Hanna Mining* must be taken against the background provided by *MEBA* v. *Interlake Co.*, 370 U.S. 173 (1962). The union conduct in both was essentially the same. In *Interlake*, state jurisdiction was denied since the Board had not ruled on the jurisdictional questions presented: "While the Board's decision is not the last word it must assuredly be the first." 370 U.S. at 185, for:

> "The Minnesota courts determined . . . that those whom the petitioners represented and sought to enlist were 'supervisors,' that consequently neither of the petitioners was a 'labor organization,' and therefore that nothing in the Garmon doctrine precluded a state court from assuming jurisdiction.
>
> "It is the petitioners' contention that the issue to be determined in this case is not whether the state courts correctly decided their 'labor organization' status, but whether the state courts were free to finally decide that issue at all. The petitioners contend that the principles of the Garmon decision confined the state court to deciding only whether the evidence in this case was sufficient to show that either of them was arguably a 'labor organization' within the contemplation of §8(b). We agree . . . analysis of the problem makes clear that the process of defining the term

'labor organization' is one which may often require the full range of Board competence." (370 U.S. at 177-178).

In *Hanna Mining*, on the other hand, the complaining party had pursued its option of going to the Board with the result that the Court was satisfied that the:

"central interests served by the Garmon doctrine are not endangered by a state injunction when, in an instance such as this, the Board has established that the workers sought to be organized are outside the regime of the Act. Cf. Incres S.S. Co. v. Maritime Workers, 372 U.S. 24. Most importantly, the Board's decision on the supervisory question determines, as we have already shown, that none of the conduct is arguably protected nor does it fall in some middle range impliedly withdrawn from state control. Consequently, there is wholly absent the greatest threat against which the Garmon doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered." (382 U.S. at 192-193).

The recent *Ariadne* case presented a situation comparable to that faced in *Interlake*. The Florida courts relying on *Incres* enjoined picketing directed at longshoremen servicing a foreign flag vessel. This Court rejected this attempt to widen the foreign flag exception to Board jurisdiction (397 U.S. at 200-201):

"The critical inquiry then is whether the longshore activities of such American residents were within the 'maritime operations of foreign-flag ships' which McCulloch, Incres, and Benz found to be beyond the scope of the Act. . . . We therefore find that these longshore operations were in 'commerce' within the meaning of §2(6), and thus might have been subject to the regulatory power of the National Labor Relations Board.

"The jurisdiction of the National Labor Relations Board is exclusive and pre-emptive as to activities that are 'arguably subject' to regulation under §7 or §8 of the Act. San Diego Building Trades Council v. Gar-

mon, 359 U.S. 236, 245 (1959). The activities of petitioner in this case met that test. The union's peaceful primary picketing to protest wage rates below established area standards arguably constituted protected activity under §7."[3]

Finally, in *Linn* the Court, while declaring malicious libel open to state regulation, took pains to circumscribe that state jurisdiction in order to preclude conflict:

"But it has been insisted that not only would the threat of state libel suits dampen the ardor of labor debate and truncate the free discussion envisioned by the Act, but that such suits might be used as weapons of economic coercion. Moreover, in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers. In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy the possibility of such consequences must be minimized. We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

"The standards enunciated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), are adopted by analogy, rather than compulsion. We apply the malice test to effectuate the statutory design with respect to preemption. Construing the Act to permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel action, and unwar-

[3] The concurring opinion in *Ariadne*, 397 U.S. at 201-202, takes the view that the state's jurisdiction turned on the legality of the union picketing under federal law. As indicated above, we believe that resolution of the question presented in that case turned on the scope of the jurisdictional limitation stated in *Incres* and not on the nature of the union conduct.

ranted intrusion upon free discussion envisioned by the Act." (383 U.S. at 64-65)

3. In the foregoing cases the Court confronted the fact that lines must be drawn between the preempted area and the area left open to the states. In each instance this problem was met with an appreciation of the insight that:

> "Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." *Garmon*, 359 U.S. at 243.

And the success this Court has achieved in drawing workable lines reflects the fact that "the nature of the activity" in question provides a reliable guide to decision.

The approach in *Gonzales* on the other hand focuses on the legal labels the state utilizes to characterize union activity. The states' scope of regulation depends on how the plaintiff and the state court define the "crux of the claim," 359 U.S. at 618. If the crux of the claim relates to membership rights the states may "fill out" the remedy, apparently without regard to the extent to which its action invades the preempted area, or conflicts with a judgement the Board would reach, 359 U.S. at 619-622. Under *Borden*, however, if the crux of the claim is within the Board's jurisdiction the state is precluded, 373 U.S. at 696-698.

Because of the nature of the relevant federal substantive law *Gonzales* puts a heavy emphasis on artful pleading and opinion writing. The scope and meaning of the internal union rules governing the maintenance of good standing

membership are critical in any §8(b)(2) case. Board litigation in this field pre-supposes a dispute about membership, see, pp. 4-5, *supra*. Thus so long as attention is focused on the nature of the legal theory presented a §8(b)(2) case can always be transmuted into a case for state jurisdiction. For to some extent the legal materials relevant to the Board, acting within its proper sphere, and to the state court, acting within the area of regulation reserved to it, overlap. Thus the state court in order to bolster its decision here went to great length to emphasize the membership aspects of the case despite the fact that Lockridge did not even seek to regain his membership (A. 99). And in a case such as *Green* v. *Folks*, 13 App. Div. 2d 744, 215 N.Y.S. 2d 116 (1961), the court dismissed an employee's action against his employer and union to recover damages for an allegedly unlawful discharge stemming from an invalid suspension from the union. The employee then turned around and sued the union on a theory of wrongful suspension, seeking reinstatement to membership and consequential damages for loss of wages. Citing *Gonzales*, the court accepted jurisdiction over this more artfully pleaded second action, 223 N.Y.S. 2d 287 (N.Y. Cty. 1961). Yet the major change in the substance of the suit was the dropping of the employer as a defendant.

Thus, the line of demarcation drawn in *Gonzales* is a shifting and uncertain one. The heavy costs of this are plain. There is a constant danger that the various state courts will condemn that which the Board would find lawful despite "the governing consideration . . . that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy," *Garmon*, 359 U.S. at 246. It is of equal importance that such decisions necessitate intervention by this Court on a case-by-case basis to preserve the federal right despite the fact that:

"The nature of the judicial process precludes an ad hoc

> inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts on the entire scheme of federal labor policy and administration. Our task is confined to dealing with classes of situations." *Garmon* 359 U.S. at 242.

It might be that *Gonzales* would be defensible if it were impossible, under any circumstances, to ascertain a clear distinction between Board and state authority. But the opposite is true. In this area as in the others discussed in part 2, pp. 10-16, *supra*, a line based on the nature of the activity in question does produce sound and principled results. For Congress has drawn a precise line between the class of conduct of "merely peripheral concern of the" Act, *Garmon*, 359 U.S. at 243, marked out in *Gonzales*, and the class of conduct of central concern under §§8(b)(2) and 8(a)(3). *Gonzales* allows the states to regulate union activity directed against membership rights, 356 U.S. at 619. "The policy of the Act is to insulate employees' jobs from their organizational rights" *Radio Officers*, 347 U.S. at 40. The focus of the Act is union activity directed against job rights. Thus the key to delimiting the preempted area is that federal law and not state law regulates union activity against an individual's employment status even though the legality of the union's conduct turns on the resolution of questions relating to the meaning and effect of the union's internal rules.

A union which deprives an individual of membership sometimes takes action also against his job rights. The latter may be a consequence of the former. Nevertheless these two forms of activity never fuse into one. The distinction between the act of expelling, suspending or otherwise disciplining a union member as a member, and the

separate act of securing his discharge, as here, or refusing to refer him to work, as in *Borden*, is manifest. And as this Court recognized in *Radio Officers* it is the distinction upon which Congress acted. The fact that these two classes of conduct may be interrelated to some extent should not, therefore create any problems in practice. For example, in *Youngdahl* v. *Rainfair*, the state's position was that preempted activity (peaceful picketing) and activity open to state regulation (threats, verbal abuse, etc.) were inextricably intertwined, and in *Schermerhorn* the argument was that the preempted action (peaceful picketing) was designed to force other action (the signing of a union security agreement) interdicted by state law. These arguments for authority to fill out the states' power even though this meant regulation of conduct within the Board's area of special concern were rejected.

It follows therefore that the Idaho court's assumption that its admitted jurisdiction to regulate a membership dispute invested it with power to regulate a discharge pursuant to a union security clause is analytically unsound. It is simply the converse of the proposition rejected in *Schermerhorn*. Here the theory is that the state should have the power to regulate conduct which can be labeled the "effect" (the discharge) since it has the power to regulate the conduct which is the "cause" (the loss of membership). In *Schermerhorn* the theory was that since the state had conceded power to regulate the "effect" (the union security clause), it should have power to regulate the "cause" (the picketing). In either case the objection to this line of reasoning is the same. Extension of state jurisdiction no matter how it is justified would disregard the point that "Congress has entrusted administration for the labor policy to a centralized administrative agency . . ." *Garmon*, 359 U.S. at 242.

In sum, we suggest that the Act leaves the states free to

regulate union activity directed at membership rights, but that the states are absolutely precluded by the Board's exclusive primary jurisdiction from regulating union activity designed to affect job rights, without regard to whether this regulation is termed an ancillary remedy or is frankly acknowledged for what it is—an attempt to enter the area preempted by the Act.

CONCLUSION

For the above stated reasons, as well as those presented by the Petitioners, the decision below should be reversed.

Respectfully submitted,

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June, 1970